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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Southwestern Bell, Pacific Bell,	)	CC Docket No. 96-262
and Nevada Bell	)	CC Docket No. 94-1
Joint Petition for Partial Stay	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review	)	CC Docket No. 94-1
for Local Exchange Carriers	)	

COMMENTS OF GTE SERVICE CORPORATION IN SUPPORT OF SOUTHWESTERN BELL, PACIFIC BELL, AND NEVADA BELL JOINT PETITION FOR PARTIAL STAY

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companies

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IN SUPPORT OF SOUTHWESTERN BELL, PACIFIC BELL, AND NEVADA BELL
JOINT PETITION FOR PARTIAL STAY

GTE Service Corporation ("GTE"), on behalf of its affiliated operating companies, submits these comments in support of the Joint Petition for Partial Stay filed by Southwestern Bell Telephone Company Pacific Bell, and Nevada Bell in the above-captioned docket on June 3, 1997.[1] The Joint Petition requests that the Commission stay portions of its *First Report and Order* in CC Docket No. 96-262, "Access Charge Reform" (released May 16, 1997) ("*Access Charge Order*") and its *Fourth Report and Order* in CC Docket No. 94-1 and *Second Report and Order* in CC Docket 96-262, "Price Cap Performance Review for Local Exchange Carriers" and "Access Charge Reform" ("*Price Cap Order*"). GTE supports the Joint Petition because implementation of those provisions would irreparably injure GTE and other local exchange carriers ("LECs") by unlawfully requiring them (i) to refrain from assessing Part 69 access

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1 *See* FCC Public Notice, DA 97-1187 (June 4, 1997).

charges (and the concomitant universal service funding obligations) on purchasers of unbundled network elements; (ii) to reduce their price-cap indices ("PCIs") to foreclose the recovery of remaining equal access non-capitalized costs; (iii) to reduce their PCIs by a new, unsupported 6.5% productivity factor; and (iv) to retroactively reduce their PCIs "as if" they had utilized the 6.5% productivity factor in their 1996 annual access tariff filings. Accordingly, grant of the requested stay manifestly is warranted.

INTRODUCTION AND SUMMARY

GTE believes that the Joint Petition provides a compelling showing for a partial stay of the *Access Charge Order* and *Price Cap Order* under the applicable administrative and judicial standards. The petitioners document that the orders force incumbent local exchange carriers ("ILECs") to shoulder the burden of significant subsidies that concededly linger in the system while their competitors can evade such continuing costs through the expedient of purchasing unbundled network elements -- even though, under the Commission's view, such elements can be "reassembled" into the virtual equivalents of ILEC access services. In so doing, the orders run afoul of the Act, the existing stay order imposed by the U.S. Court of Appeals, and the Commission's professed commitments to "competitive neutrality," elimination of artificial subsidies, and cost-based pricing of services.

The petitioners also document that the agency's actions constitute a *de facto* restoration of discarded rate of return regulation through the artifice of tinkering with price cap productivity factors. This back door approach undermines the very premises upon which the entire price cap regime was established. Moreover, the *Price Cap Order* seemingly extrapolates a *carte blanche* to engage in unfettered retroactive rulemaking from a single court of appeals case arising in a different and far more limited context.

In light of the exhaustive treatment of the stay standard showings by the petitioners, GTE's comments are not intended to unnecessarily repeat the facts and the law already entered into the record. Instead, these comments will focus upon complementary and supplementary points that corroborate the need for an immediate stay of the orders. As summarized here and detailed below, the relief requested is warranted under recognized stay principles.

Likelihood of Success on the Merits. The access charge and price cap orders are not likely to survive judicial review because of several fundamental flaws:

- *Treatment of Unbundled Network Elements.* Exempting unbundled network elements from access charges violates the Eighth Circuit stay order while producing an unlawful and anticompetitive regime under which competitors purchasing an ILEC's unbundled network elements can evade costs and implicit subsidies, which are left to be borne by the ILEC and its customers.

- *6.5% X-Factor.* The lack of any meaningful record evidence to support imposition of a 6.5% X-factor gives rise to the conclusion that the number reflects unlawful agency efforts to reduce rates of return and prices through the expedient of an arbitrary recalculation of ILEC productivity. In addition, there is no record or policy basis for the continuation of the consumer productivity dividend, which was never intended to be a permanent price cap fixture.

- *Retroactive Imposition of the 6.5% X-Factor and a Sharing Obligation for 4% Price Cap LECs.* The Price Cap Order arbitrarily and discriminatorily imposes a restated 6.5% X-Factor on all price cap LECs along with a continued sharing obligation for 4% price cap LECs. The effect of this action is to retroactively redefine the productivity factor for all price cap LECs to meet the Commission's unsupported estimate of current productivity. To that end, the *Price Cap Order* arbitrarily and capriciously saddles 4% price cap LECs with a discriminatory and excessive downward PCI adjustment that includes duplicative consumer dividends and sharing obligations.

Irreparable Injury to Petitioners Absent a Stay. As the Joint Petition explains, monetary losses constitute irreparable harm where "adequate compensatory or other corrective relief" is not available to the interested party. For its part, GTE will suffer estimated losses of approximately $31.7 million due to the new 6.5% X-factor (*see* attached Affidavit of Orville D. Fulp). This figure will rise dramatically in future years as the illegal X-factor carries forward into additional years. With the opening of the local exchange to competitive entry, neither GTE nor the petitioners can subsequently recapture lost revenues through the raising of rates. Similarly, neither GTE nor the petitioners can be adequately compensated for the loss of customers resulting from the unlawful and anti-competitive effects of the exclusion of unbundled network elements from access charges.

No Harm to Others and the Public Interest Considerations Favoring a Stay. GTE concurs in the petitioners' proposal to establish an accounting mechanism to obviate any potential injury to third parties. Indeed, grant of a stay would be consistent with important public interest considerations given the enormous disruptions that would be associated with a court reversal of the new rules and the avoidance of a conflict with the Eighth Circuit's stay order in the process. The requested stay would also avoid a violation of the Commission's statutory obligations under the Congressional Review Procedures Act. Notwithstanding the agency's legal duty to give Congress sixty days notice before new rules of this importance take effect, there is no indication that such notice has or will be given. Accordingly, a stay would be consistent with the public interest by avoiding disruptions to American consumers as well as any collision between the agency's desire for haste and the Congressional right to review important new rules before, not after, they take effect.

I. LIKELIHOOD OF SUCCESS ON THE MERITS

When the pertinent provisions of the Commission's *Access Charge Order* and *Price Cap Order* are analyzed in light of the Eighth Circuit's *Interconnection Order* stay, the Act, and fundamental principles of administrative law, there can be little doubt that the Joint Petitioners are likely to succeed in reversing the FCC's determinations on appeal. The new rules are inconsistent with an existing judicial stay order, lack record support, violate the Act and, consequently, constitute arbitrary and capricious decisionmaking.

A. The FCC's Determination Not to Apply Access Charges to UNE Purchasers Conflicts with the Eighth Circuit's Stay and the Requirements of the Communications Act

The Commission's resurrected determination not to permit ILECs to assess access charges (including subscriber line charges) on purchasers of unbundled network elements ("UNEs") exhibits two fatal flaws: it directly conflicts with a standing court order, and it is the result of decisionmaking that is riddled with fundamental error.

1. The *Order* Is Inconsistent with the Eighth Circuit Stay

As the Joint Petition makes clear, the Commission ignores the fact that its actions explicitly conflict with the stay entered by the United States Court of Appeals for the Eighth Circuit in its review of the FCC's *Interconnection Order*.[2] In issuing the stay, the court cautioned that the FCC's pricing rules (which include the prohibition against imposition of access charges on purchases of UNEs) "would result in many incumbent LECs suffering economic losses beyond those inherent in the transition from a monopolistic market to a

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[2] *First Report and Order*, CC Docket No. 96-98, "Implementation of the Local Competition Provisions in the Telecommunications Act of 1996," (released August 8, 1996) ("*Interconnection Order*"), *stayed by Iowa Utilities Bd. v. FCC*, No. 96-3321 (8th Cir. Oct. 15, 1996) ("*Stay Order*").

competitive one."[3] As a result, the Eighth Circuit stayed, *inter alia*, Section 51.515(a) of the rules, which is effectively identical to the access charge prohibition adopted herein.

A stay is the equivalent of an injunction against enforcing the terms of an agency order.[4] Accordingly, the Commission may not use this proceeding to accomplish indirectly what the Eighth Circuit has initially determined it is not empowered to do directly.[5] Thus, the Commission should not and cannot flout the court's mandate in this manner.

2. The *Order* Is Arbitrary, Capricious, and Contrary to Law

The Joint Petitioners further demonstrate that the exemption of purchasers of unbundled network elements from access charge payments that would otherwise contribute to the funding of universal service requirements is unlawful under the Act, inconsistent with the *Universal Service Order*, and unreasonably discriminatory *vis-à-vis* other purchasers of functionally equivalent capabilities. The order admits that universal service costs contained in access charges have not been and cannot be identified, much less eliminated, at this time. This significant departure from the Act's requirement that all carriers contribute to defray these costs is, nonetheless, dismissed as decisionally insignificant because "excluding access charges from the sale of unbundled

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[3] *Stay Order* at 18.

[4] *See Stadia Oil & Uranium Co. v. Wheelis*, 251 F.2d 269, 275 (10th Cir. 1957) (citation omitted) ("[i]t is an old maxim of the law that a person will not be permitted to do indirectly what he cannot do directly"). *See also Fentron Industries Inc. v. National Shopmen Pension Fund*, 674 F.2d 1300, 1306 (9th Cir. 1982)("The Fund and its trustees cannot be permitted to do indirectly what would be prohibited if done directly . . . .").

[5] *See, e.g., Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1985); *Licensing of General Category Frequencies in the 806-809.750/851-854.750 MHZ Bands,* 11 FCC Rcd 9707 (1995) ("The *sine qua non* for the grant of a motion for stay is a showing of irreparable injury that will result from the agency decision in the absence of injunctive relief.").

elements will not dramatically affect the ability of price cap LECs to fulfill their universal service obligations."[6]

A mere three pages later in the *Access Charge Order*, however, the Commission reaches a diametrically opposite finding. In exempting information service providers ("ISPs") from access charges, the agency again concedes that the "access charge system contains non-cost-based rates and inefficient rate structures, and this Order goes only part of the way to remove rate inefficiencies."[7] But, instead of dismissing concerns about collecting these subsidies as *de minimis*, these costs were deemed to be potentially harmful for the information industry. Nowhere does the Commission reconcile these conflicting conclusions about the magnitude of the remaining subsidies, much less explain how it could even reach either conclusion in the absence of an ability to quantify the non-cost-based elements in current access rates. It would be difficult to conceive of more compelling evidence of irrational, result-oriented decisionmaking on the part of a federal agency.

The Joint Petitioners further explain that the exemption of UNEs from access charges is inconsistent with the adoption of a "competitive neutrality" principle for universal service contributions in the *Universal Service Order*.[8] There, the agency defined competitive neutrality to mean, *inter alia*, "that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another" and found that adoption of such a principle is both "necessary and appropriate for the protection of the public interest" and

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6 *Access Charge Order*, ¶ 338; *see* Joint Petition at 7-10.

7 *Access Charge Order*, ¶ 345.

8 Joint Petition at 9-11.

"consistent with [the] Act" as required by § 254(b)(7).[9] Clearly, however, it is not competitively neutral to require incumbent LECs alone to be burdened with the obligation of collecting universal service funds from their access customers, while relieving competitive LECs of any similar obligation. Indeed, the obvious disadvantage resulting from this disparity is precisely the type of distinction the Commission found to violate competitive neutrality in the context of recovery of number portability costs pursuant to Section 251(e)(2) of the Act.[10]

The FCC's affirmative perpetuation of the universal service funding mechanisms contained in existing access charges while exempting UNE purchasers from participating in those mechanisms also is a flagrant violation of Section 254(d) of the Act, which provides that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, *on an equitable and nondiscriminatory basis*, to the . . . mechanisms established by the Commission to preserve and advance universal service."[11] The Commission's arbitrary exemption of a class of carriers, *i.e.*, CLEC purchasers of UNEs, from making an equitable and

9 CC Docket No. 96-45, "Federal-State Joint Board on Universal Service, ¶¶ 47, 51 (released May 8, 1997).

10 *See Telephone Number Portability*, 11 FCC Rcd 8352, 8415-24 (1996), *recon.*, FCC 97-74 (adopted March 6, 1997).

11 47 U.S.C. § 254(d) (emphasis added). GTE believes that the Commission erred in not adopting a comprehensive universal service plan based on "specific, predictable, and sufficient mechanisms" to ensure that all universal service requirements are satisfied at both the federal and state levels. Such a comprehensive mechanism should, of course, include the removal of universal service subsidies from access rates. GTE will raise these issues at the appropriate time. It is sufficient for purposes of these comments that, because the Commission has expressly determined to continue using access charges as a universal service funding mechanism, the agency is bound by the requirement of Section 254(d) in effectuating that decision.

nondiscriminatory contribution to the universal service requirements funded by access charges cannot be deemed to be consistent with this provision.[12]

Finally, the Joint Petition shows that requiring ILECs to assess such dramatically different charges on CLECs purchasing UNEs as compared to resellers acquiring functionally equivalent access services is unreasonably discriminatory. It cannot be disputed that both purchasers acquire effectively identical capabilities to terminate access traffic, particularly given the Commission's requirement that UNEs be provided on a fully rebundled basis that is identical to a resold local exchange service.[13] The Order's suggestion that the disparity is justified by the limitations placed on a resale customer is a make weight and wholly deficient rationalization. Accordingly, for all of these reasons, the exemption of UNE purchasers from payment of access charges is arbitrary, capricious, and contrary to law and should be stayed.

B. The FCC's Decision in the Price Cap Proceeding To Prescribe a New Productivity Factor and To Levy a One-Time Downward Adjustment Is Likewise Arbitrary, Capricious, and Contrary to Law

The Commission's *Price Cap Order* is a significant and entirely unwarranted departure from the agency's previous attempts to fine tune its system of price cap regulation. The FCC has made a number of determinations in its order that are no more than *post hoc* rationalizations for

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12 *See Universal Service Order*, ¶¶ 777-86, 842-57 (requiring *all* interstate telecommunications carriers to make contributions to the universal service fund based on their end-user telecommunications revenues). For the same reason, the Commission's suggestion that application of access charges to UNE purchasers would violate the pricing standard for UNEs set out in Section 252(d)(1)(A) is baseless. *See Access Charge Order*, ¶ 336.

13 *See Interconnection Order*, ¶ 328; *see also Ad Hoc Telecommunications User Comm. v. FCC,* 680 F.2d 790, 795 (D.C. Cir. 1982) (stating that the "like services" test examines "functional equivalency," which is defined as "whether the services in question are different in any material functional respect") (quotation omitted).

the agency's apparent desire to reimpose rate of return-type regulation on LECs, to artificially "jump start" local competition, and to implement rate reductions promised to Congress. Rather than engage in reasoned decisionmaking, the FCC has chosen to further these goals by burdening ILECs with an increasing number of arbitrary restraints on their ability to generate revenue.

As the discussion below shows, the fact that almost every aspect of the new price cap rules have no basis in economic reality is powerful evidence that the Commission engaged in entirely inappropriate result-oriented decisionmaking. Nor is the Commission entitled to the broad deference sometimes accorded an agency in perfecting a new regulatory regime. The price cap regime is now seven years old. As discussed below, the *Price Cap Order* fails to provide carriers with adequate notice of their obligations, disturbs legitimate reliance interests, and makes rational business planning impossible.

1. The FCC's Choice of X-Factor and CPD Is Unsupported

One of the most troubling aspects of the *Price Cap Order* is its derivation of the X-Factor used to measure the ILECs' productivity. The Joint Petition demonstrates that the FCC, ignoring its own prior determinations regarding the best evidence of LEC productivity, selectively disregarded relevant and reliable historical data in generating a productivity figure chosen from the high end of an artificially inflated range.[14] GTE agrees that, for all of the reasons stated in the Joint Petition, the 6.5% X-Factor prescribed by the Commission is arbitrary and unsupported by the record herein.[15]

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14 After adding a .5% consumer productivity dividend ("CPD"), discussed below, the final figure adopted by the Commission was 6.5%. Had the record evidence been properly factored into the result, however, the figure adopted would have been 5.2% (not including the CPD).

15 *See* Joint Petition at 16.

Moreover, the FCC's analysis ignores the impact that its repeated, arbitrary upward revisions of the X-Factor will have on future ILEC productivity. These unpredictable increases, coupled with the retroactive downward adjustments in the PCIs related to past time periods, create a powerful disincentive for ILECs to seek additional productivity gains.

The impact of the Order's unjustified discounting of certain record evidence in its X-Factor calculation is exacerbated by its failure to address the effect of the massive changes in the local exchange industry being worked by implementation of the Telecommunications Act of 1996. As the FCC is well aware, that legislation opens local exchange markets to new competitive entry and, under rules promulgated by this Commission, imposes substantial implementation burdens on incumbent LECs. The combination of the likely loss of some of the ILECs' most profitable customers with the diversion of ILEC resources to the accommodation of new entrants' demands for interconnection, unbundled elements, and support services inevitably will depress LEC productivity, particularly in the near term. Yet, the FCC expressly disclaims any intent to decide "what, if any, changes to the X-Factor we should make with the lowering of barriers to competitive entry or the development of competition."[16]

Especially disturbing is the Order's concomitant refusal to acknowledge the dramatic disincentives for network investments resulting from the pricing principles it has attempted to impose in the *Interconnection Order*. It would not be economically rational for an ILEC to invest in the deployment of new technologies or facilities when its competitors can convert that investment to their own use for substantially less than its actual cost by taking advantage of the

[16] *Price Cap Order*, ¶ 131. The FCC offers little more in the way of such analysis in dismissing any potential impact from the reform of access charges and universal service funding. *See id.*, ¶¶ 117-19, 128-32.

FCC's unbundling rules and TELRIC pricing standard. It simply is illogical to conclude that historical productivity gains can not only be maintained, but exceeded, in the absence of any incentive or ability for ILECs to invest in their networks.

As a separate matter, there is no economic basis for the Commission's decision to perpetuate a 0.5% consumer productivity dividend. When the price cap rules were implemented in 1990, the consumer productivity dividend was supposed to be a one-time return to consumers that reflected the spike in revenue brought about by the new regulations. Although seven years have elapsed since price cap regulation was introduced, the *Price Cap Order* retains the CPD, a decision that is contrary to sound economics and lacks adequate explanation. As the Joint Petition correctly observes, the FCC has not explained what this figure is, how it is generated, or why it is included in prospective adjustments as well as the one-time retroactive adjustment.[17]

In the *Price Cap Order*, the Commission confidently asserts that its new price cap scheme is now all but free of economic distortions:

> This new price cap reflects *a more reliable productivity estimate than in past Orders*, one that is based on a careful analysis of the rate of growth of incumbent LEC total factor productivity (TFP) and the rate of change of LEC input prices. We also eliminate the sharing requirements of the current rules, which substantially undercut the efficiency incentives of price cap regulation and retained some of the cost-misallocation incentives inherent in rate-of-return regulation. These forward-looking reforms to our price cap plan for incumbent LECs *will allow services to be more readily removed from price regulation as warranted by the development of a competitive marketplace.*

Price Cap Order, ¶ 1 (emphasis added). Despite this pronouncement, the Order retains a dividend figure that was calculated under less reliable rules. In so doing, the Order never recognizes that, if the X-Factor is now measured with more precision, an additional incentive to

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[17] *See* Joint Petition at 18-19.

improve productivity is unnecessary and will serve perversely to impede productivity by substantially reducing ILEC revenues.

This continuation of the 0.5% CPD is particularly egregious in the new competitive environment. The access customers, such as AT&T and MCI, who will directly benefit from the forced rate reduction are now the ILECs' biggest competitors in the local exchange market. As a result, the ILECs' ability to compete effectively will be diminished considerably in a time when they are already under ever-increasing competitive pressures. Moreover, there is no regulatory mechanism to ensure that end users/consumers will see any of the resulting access charge reductions in their rates for long distance services.[18]

The Commission has thus adopted an X-Factor and a consumer productivity dividend arbitrarily and without adequate explanation. The difference between an accurate figure and an arbitrary one is of critical importance to ILECs. If the X-Factor overestimates an ILEC's productivity, the carrier will suffer unwarranted losses of revenue, and such an excessively high productivity figure will concomitantly act as an impediment to increased efficiency. These manifest errors in the FCC's calculations demonstrate that a stay is warranted.

2. Application of the New X-Factor to Reinitialize 1996 PCIs Is Unlawful

The FCC's result-oriented decisionmaking is most evident in the imposition of the new X-Factor for the 1996-97 access year. The Commission attempts to justify this retroactive ratemaking by relying on the Court of Appeals for the District of Columbia Circuit's decision in

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[18] As noted above, this harmful competitive impact of the consumer productivity dividend was never addressed by the Commission, further evidence that the FCC is interested more in imposing lower phone rates by regulatory fiat than in allowing the market to lower rates as Congress intended.

(Continued...)

Bell Atlantic Telephone Companies v. FCC.[19] The context in which that case was decided, however, makes it inapposite. In *Bell Atlantic*, the court reviewed an FCC price cap reinitialization that was implemented when the agency was still attempting to deal with significant uncertainties and concerns involving the price cap system. Given the complexities of the case, the D.C. Circuit deferred to the Commission's expertise:

> With so many local exchange carriers in the sharing zone, the Commission had good reason to believe that the original X-factor had been too low and therefore adjusted it upward. And because so few local exchange carriers had chosen the optional X-factor and in light of the diversity of local exchange carrier performance under price caps, the Commission decided to change the options available to local exchange carriers. With the exception of those two changes, *the Commission retained the same X-factor methodology on an interim basis and deferred other major changes until the record was more complete*. Its decision in this respect was within the bounds of the discretion entrusted to it.[20]

By contrast, the Commission has had two years since it issued the order reviewed in *Bell Atlantic* and seven years since price caps were first introduced to develop the means to calculate accurate productivity indicators for ILECs. During this time, ILECs have been required to adjust their operations repeatedly to account for the FCC's ever-changing formulas. The principles of administrative law and regulatory finality simply do not permit an agency to alter its regulations in such an erratic, *post hoc* fashion over so long a period under the guise of mere "corrections."

Bell Atlantic is also distinguishable because the impact of the rules then under review is factually different and far less extreme than the consequences of those now promulgated by the Commission. In 1995, even after reinitialization, carriers were still able to choose among higher

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(...Continued)

19 79 F.3d 1195, 1202-05 (D.C. Cir. 1996) ("*Bell Atlantic*").

or lower X-Factors, with or without sharing. By contrast, the *Price Cap Order* offers no such choice. All carriers, regardless of size, revenue, or other circumstance, must return 6.5% their inflation-adjusted revenues to ratepayers. In addition, those carriers presently using a 4.0% X-Factor will suffer more than double the harm experienced by 5.3% carriers insofar as they must reduce rates by an additional 2.5%, as compared to 1.2%. Moreover, this adjustment is by no means a one-time event: the financial hit will handicap carriers such as GTE for years to come.

The adverse consequences of the retrospective reinitialization of PCIs required by the Commission are exacerbated for those 4% price cap carriers, like GTE, that remain subject to sharing obligations. Notwithstanding the FCC's recognition of the pernicious effect of sharing on LEC performance and incentives, such carriers must make yet another downward adjustment to their 1997 rates, on top of the 1996 6.5% restatement and the 1997 X-Factor adjustment, to implement sharing.[21] The combination of these reductions ensures that the impact of this order on GTE's revenues will far exceed that permitted by the court in *Bell Atlantic*.

The manifest unfairness of what amounts to an effective double-counting of customer interests in the price cap regime -- at the expense of LEC interests -- is strikingly illustrated by the retroactive application of the CPD. The Joint Petitioners have already pointed out the irrationality of attempting to apply a behavioral incentive to past conduct.[22] It is equally irrational for the Commission to seek to recapture or, at the very least, to correct in the future for

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(...Continued)

20 *Id.* at 1204 (citations omitted) (emphasis added).

21 *See* 47 C.F.R. § 61.45(d)(2)(ii).

22 Joint Petition at 18-19.

the purported understatement in 1996 of the "flow through" benefits of the CPD where those benefits have already been secured through sharing requirements.[23]

GTE submits that, under these circumstances, it is clear error and a violation of carriers' legitimate reliance interests to require carriers that elected a 4.0 X-Factor in 1996 to both reinitialize their PCIs based on 6.5% and implement sharing. At a minimum, it is unreasonably discriminatory to retroactively impose both the CPD and sharing.[24] No carrier could have reasonably anticipated that the FCC would adopt such unprecedented and oppressive revisions to its rules. For all of these reasons, the Commission's *Price Cap order* is arbitrary and capricious, and unlawful.

II. GTE'S IRREPARABLE INJURY

Absent a stay, GTE will suffer irreparable harm. As explained in the Joint Petition and by the Eighth Circuit, monetary losses are considered irreparable when there is no adequate compensation or other form of relief. Loss of customers, and customer goodwill, is similarly irreparable, particularly in the dynamic and increasingly competitive market created by the Telecommunications Act. As the Joint Petition points out, the *Access Charge Order* will severely curtail ILEC revenues and also give CLECs an unfair competitive advantage.

The *Price Cap Order* will damage GTE by lowering its access rates to unreasonable and unexplained levels. The prospective revenue losses facing GTE are by no means trivial amounts.

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23 *See Price Cap Order*, ¶ 154 (noting that the CPD serves the same flow through function as sharing, particularly at the 6.5% X-Factor level).

24 Certainly, sharing cannot be justified in this case for earnings attributable to the difference between use of a 4.0% and 5.3% X-Factor for 1996, where carriers could have chosen the latter if the Commission's radical changes had been properly noticed.

As the appended affidavit of Orville D. Fulp shows, the increase in the X-Factor to 6.5% will cause GTE to lose an estimated $31.7 million. This is in addition to the $19.2 million impact of GTE's sharing obligation. Nor will GTE's financial injury be a one-time adjustment to the new rules. The future effects of the Commission's triple burden of an increased X-Factor, the retroactive PCI reinitialization, and the sharing obligation will increase geometrically in future years.

In fact, competitive pressures and regulatory restrictions will ensure that GTE would be unable to recoup these substantial losses through increased rates for other services.[25] If rates are raised to unreasonably high levels, customers will abandon GTE in favor of well-financed and sophisticated CLECs. Moreover, no amount of money can replace a carrier's loss of a customer and the concomitant loss of goodwill.[26] The grant of the stay, therefore, is necessary to avoid millions of dollars in unrecoverable revenue losses as well as unquantifiable additional harm that ILECs like GTE will suffer under the new access charge and price cap rules.

III. NO INJURY TO THIRD PARTIES

Staying the Commission's new rules while the Court of Appeals conducts its review will not harm any third parties. GTE endorses the Joint Petitioner's solution of implementing an accounting system while a decision is pending, which will guarantee that neither CLECs nor consumers suffer any monetary loss. GTE will scrupulously account for any difference in rate levels that may result from judicial review and distribute the appropriate amounts with interest in accordance with the court's decision. *See* Fulp Affidavit.

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[25] *See* Fulp Affidavit, ¶ 13.

IV. A STAY IS IN THE PUBLIC INTEREST

Joint Petitioners are clearly correct in asserting that the public interest strongly favors a grant of their stay request. First of all, the public interest always favors holding regulatory bodies to the rigorous standards of lawful and reasoned decisionmaking. Second, a stay would avoid conflict with the Eighth Circuit's stay of the Commission's *Interconnection Order*. Third, a stay would further promote competition in telecommunications by avoiding crippling and permanent financial losses to ILECs when their revenues are simultaneously slashed by the higher X-Factor, the continued sharing obligation, the retroactive adjustment, and the competitive handicaps associated with exempting UNE purchasers from access charges.

As a separate matter, a stay would also afford the Commission an opportunity to comply with the regulatory review statute enacted by Congress in 1996 (5 U.S.C. § 801 *et seq*.). That statute reflects a congressional determination that "major rules" -- including rules with "an annual effect on the economy of $100,000,000 or more," 5 U.S.C. § 804(2)(A) -- should not take effect until sixty days after publication in the Federal Register or sixty days after transmission to Congress (whichever is later). 5 U.S.C. § 801(a)(3). The purpose of the statute is to give Congress an opportunity to review and consider agency regulations – such as those at issue – which have a profound impact on the national economy.[27] The statute does include an exemption from the term "major rule" for "any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act" (5 U.S.C. § 804(2)). However, it is otherwise

(...Continued)

26 Stay Order at 18-19.

27 Other requirements include agency submission to Congress of a report regarding a new rule and the Comptroller General's circulation of a report on a major rule to specified

(Continued...)

sweeping in its applicability to "major rules," reflecting the importance that Congress assigned to the public interest in deferred effectiveness for rules with a significant economic impact.

A review of the facts in this case confirms that the Commission cannot lawfully implement the new access charge and price cap rules until compliance with the Congressional Review Procedures Act has occurred. The regulations at issue here plainly have an impact of more than $100 million per year; they do not fall within the Telecommunications Act exemption; and they are scheduled to take effect in less than the specified sixty days in violation of the clear terms of the regulatory review statute.

The new Price Cap rules, for example, unquestionably will have an impact of more than $100 million per year. It also is clear that the order is not "a rule promulgated under the Telecommunications Act of 1996." 5 U.S.C. § 804(2)(C). Indeed, the *Price Cap Order* is a *1994* docket that predates the 1996 Act. Similarly, the *Access Charge Order* certainly cannot be characterized as promulgation rules "under the Telecommunications Act of 1996," 5 U.S.C. § 804(2)(C), as nothing in the Telecommunications Act mandates access reform.

It follows that issuance of the stay requested by the Joint Petitioners will promote the public interest by (i) ensuring that the FCC's decisionmaking is consistent with all legal requirements, (ii) avoiding a conflict with the mandate of the Eight Circuit, (iii) avoiding the disruption of competitive developments in local exchange markets, and (iv) permitting compliance with the Congressional Review Procedures Act.

(...Continued)
congressional committees. 8 U.S.C. § 801(a)(1)-(2).

CONCLUSION

For the foregoing reasons, GTE and its affiliated telephone companies support the Joint Petition of Southwestern Bell, Pacific Bell, and Nevada Bell, and respectfully request that the FCC stay its *Access Charge Order* and the *Price Cap Order* as described herein.

Respectfully submitted,

GTE SERVICE CORPORATION,
on behalf of its affiliated operating companies

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June 9, 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Access Charge Reform	))	 CC Docket :No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	))	CC Docket No. 94-1

AFFIDAVIT OF ORVILLE D. FULP

I, Orville D. Fulp, being duly sworn, hereby declare the following;

1. I am Director-Network Access Services for GTE Telephone Operations ("GTE"). I am responsible for the development, introduction, and management of GTE network access services in the interexchange carrier market segment. I have over 10 years experience with GTE. During that time I have held various positions, primarily related to pricing, regulatory and product management functions.

2. In my capacity as Director-Network Access Services, I am familiar with the impact on GTE's telephone operating companies of the Commission's decisions that are the subject of GTE's comments to which this Affidavit is attached.

3. The Commission's rule change (§ 61.45(d)(2)(ii)) which requires the retention of the sharing obligation for the earnings prior to July 1, 1997, in addition to the increase in the X-factor to 6.5 percent (and the requirement to recalculate the PCIs "as if" the 6.5 percent X-Factor were in effect for the 1996 annual tariff filing) significantly increases the reductions that GTE must make in the 1997 annual access tariff filings for its tariff entities. Prior to the Commission's *Price Cap Order*, GTE had the option of selecting either a 4.0 percent, 4.7 percent or 5.3 percent productivity factor (§ 61.45(b)(1) and § 61.45(c)) for the Traffic Sensitive, Trunking and Common Line baskets in order to calculate

the annual access tariff filings impact. The first two options required GTE's tariff entities to share earnings if they had rates of return above specified levels. The third option, a productivity factor of 5.3 percent, did not require any sharing.

4. For the 1996 annual access tariff filing, some of GTE's tariff entities selected the 4.0 percent factor with a sharing requirement and others selected the 5.3 percent factor with no sharing requirement.

5. Some of the tariff entities that selected a 4.0 percent factor incurred sharing obligations for earnings during the period July 1, 1996, through December 31, 1996. Any additional sharing obligations for the period January 1, 1997, through June 30, 1997, have not been determined as the financial information required to calculate any obligations will not be available until the end of 1997. If sharing obligations for this latter period exist, those obligations would be reflected in the form of PCI reductions for the 1998 annual access year.

6. The attached chart shows the impact of the FCC's change in the price cap plan. This chart accurately reflects how GTE can expect to be harmed as a result of these changes.

7. Prior to calculating the effects of the new, single 6.5 percent X-Factor back to the 1996 annual tariff filing, GTE would have to make a $196.4 million reduction in the upcoming 1997 annual access filing. This amount includes the X-Factor impact using 4.0 and 5.3 percent options, the June 3, 1997, within-band filing effects, the impact of CCL reductions due to the increased multiline business SLC cap to $9, and the impact of the LTS exogenous adjustment (as required by NECA's May 21, 1997, update).

8. GTE's sharing obligations for 1996 earnings are treated as exogenous adjustments in the price cap formula on a tariff entity basis. Using the sharing levels currently in effect for the 4.0 percent productivity option, the impact of this sharing obligation is $19.2 million (for the

time period July 1, 1996 to December 31, 1996) of the expected $196.4 million reduction discussed above.

9. The *Price Cap Order* directs GTE to increase the X-Factor to 6.5 percent in all tariff entities (back to July 1, 1996, as stated above) in addition to retaining any sharing obligations associated with the previous selection of the 4.0 percent X-Factor, which will be reflected in the price cap formula as an exogenous adjustment.

10. GTE's estimated reduction for the 1997 annual access filing that reflects both the retention of the 4.0 percent X-Factor selection sharing obligation *and* the 6.5 percent X-Factor increase back to July 1, 1996, for all tariff entities is $260.4 million.

11. GTE's estimated reduction for the 1997 annual access filing that reflects: 1) retention of the sharing obligation incurred for selecting the 4.0 percent X-Factor option in several tariff entities; 2) the retention of the 4.0 percent X-Factor option for those same tariff entities (not increasing the X-Factor to 6.5 percent in 1996); 3) an increase in the X-Factor to 6.5 percent for all other tariff entities in 1996 (those previously selecting 5.3 percent); and 4) an increase to 6.5 percent for all tariff entities in 1997; is $228.7 million.

12. The incremental difference between the two scenarios is $31.7 million. In effect, the impact of the *Price Cap Order* is requiring GTE to reduce its rates by this amount.

13. If GTE is required to adjust its PCIs for the new 6.5 percent X-Factor recalculated back to July 1, 1996, and to reflect sharing obligations associated with a 4.0 percent X-Factor selection for the same period as required by the *Price Cap Order*, it cannot expect to recoup these lost revenues at a future date if the FCC's decision is reversed on reconsideration or on appeal. Even if the FCC permits GTE to increase its rates at some future date, it may not be able to maintain those rates in the face of growing competition in the market for access services. GTE's access services increasingly are becoming subject to competitive pressures, particularly in